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Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 368.

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE,"
G. P. PUTNAM'S SONS (INTERVENOR), *Appellant*,
v.
ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, *Appellee*.

BRIEF FOR APPELLEE.

Statement of the Case.

The case was begun by the filing of a petition by Edward W. Brooke, Attorney General of the Commonwealth of Massachusetts (hereinafter called "the Attorney General"), pursuant to G.L. c. 272, § 28C, as amended (R. 1-2). The said petition represented that the book entitled *John Cleland's Memoirs of a Woman of Pleasure* (commonly known as *Fanny Hill*) (hereinafter called "*Memoirs*") was at that time being imported, sold, loaned or distributed in the Commonwealth; that the author thereof was John Cleland; and that the publisher and copyright holder was G. P. Putnam's Sons of the City of New York. The petition sought entry of a final decree adjudging the said book to be obscene, indecent and impure (R. 1-2).

On the same day, a Justice of the Superior Court indicated that a summary examination of the book in question

established that there was reasonable cause to believe that the book was obscene, indecent and impure, and—in accordance with chapter 272, § 28C—issued an order of notice directed against the book (R. 2-5). On motion by the Attorney General filed pursuant to the same section, an interlocutory finding and adjudication that the book was obscene, indecent and impure was entered (R. 5).

G. P. Putnam's Sons of the City of New York, the publisher and copyright holder (hereinafter called "the publisher"), intervened on behalf of the book and filed an answer, which answer asserted that the book in dispute was protected by the First and Fourteenth Amendments to the Constitution of the United States (R. 6-7). Trial by jury not having been claimed by the publisher, the matter was heard by a Justice of the Superior Court. The book was placed in evidence, and expert witnesses testified. The evidence was reported to the Supreme Judicial Court (R. 7-100). The trial judge issued findings of fact, rulings of law and an order for final decree (R. 100-117). A final decree adjudging the book in question to be obscene, indecent and impure under the provisions of chapter 272, §§ 28C, 28E and 28F, and declaring that the book was not entitled to the protection of the First and Fourteenth Amendments to the Constitution of the United States was entered (R. 117-118).

The publisher filed a claim of appeal from the abovementioned final decree of the Superior Court (R. 118). On April 22, 1965, the Supreme Judicial Court affirmed the final decree (R. 130). *Attorney General* v. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure,"* 1965 Mass. Adv. Sh. 635 (R. 120-129). In accordance with Massachusetts practice, the Superior Court entered a final decree after rescript consistent with the opinion of the Supreme Judicial Court. On June 21, 1965, the publisher filed a notice of appeal to the United States Supreme Court

from both the judgment of the Supreme Judicial Court and the decree entered thereon by the Superior Court (R. 137-140). On November 8, 1965, probable jurisdiction was noted and the case was placed upon the summary calendar (R. 141).

Summary of Argument.

The United States Supreme Court has held, and continues to hold, that material which is obscene is not entitled to the protection of the First Amendment. Although ideas having even the slightest redeeming importance must be protected, obscenity—characterized by its utter worthlessness—may constitutionally be suppressed. Thus each piece of writing must be examined to determine whether such redeeming value is in fact present.

The actions and descriptions of the book before the Court are entirely sex-oriented, without additional material of any kind. Neither the book's style nor the time of its writing is enough to satisfy the "social importance" test of *Roth*. Although expert witnesses introduced by the publisher strained to find value in the writing, a reasonable examination reveals that the book totally lacks any idea or other element which might warrant protection.

The *Roth* case established a second test for obscenity, *i.e.*, whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. *Memoirs* complies with each of the requirements contained in this rule. The average person will view the book as a sex adventure, not simply as an example of eighteenth-century English literature. Contemporary attitudes toward sex may be more liberal than in the past, but it can hardly be said that there is general public acceptance of what appears in this volume. Since the book is virtually the same

from cover to cover, it is a simple matter to consider the work as a whole. *Memoirs* clearly conforms to the definition of an "appeal to prurient interest" developed by the American Law Institute and accepted by this Court.

In the *Manual Enterprises* case the United States Supreme Court added a third test. It was therein stated that writing—in order to be adjudged obscene—must "affront current community standards of decency," a quality which the Court referred to as "patent offensiveness" or "indecency." The sense of propriety and good taste of the average person will be offended by this book. This test looks not to the protection of freedom to dissent but to identification of general attitudes of the national community. Skillful writing alone will not prevent the material from being patently offensive.

Decisions rendered since *Roth* have not changed the approach to obscenity. Fair application of the tests requires that *Memoirs* be held to be obscene. Should the tests never be applied, or should their effect be suspended in individual cases, development of them by the United States Supreme Court could well turn out to have been a vain endeavor. Should this Court rule that *Memoirs* does not meet the tests, it is doubtful that these standards may ever successfully be applied to writing which is in novel form.

Argument.

I. John Cleland's "Memoirs" is Utterly Without that Redeeming Social Importance which would Entitle the Book to Protection by the First Amendment to the Constitution of the United States.

When the issues raised by the companion cases of *Roth* v. *United States,* and *Alberts* v. *California,* 354 U.S. 476, were before the United States Supreme Court in 1957 a

majority of that tribunal rejected as an acceptable alternative the possibility that First Amendment guaranties must be applied absolutely and that accordingly no obscenity legislation whatever could—from a constitutional point of view—be justified. The Court therefore maintained, and has continued to maintain, that certain forms of speech and expression are not entitled to First Amendment protection. In setting forth its position that the First Amendment was not to be considered absolute, the Court indicated that material completely without social or other value would not be protected.

> "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion —have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. *But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . .*" (Emphasis supplied.)
>
> *Roth* v. *United States, supra,* at p. 484.

The Court thus set forth the so-called "social value" test—*i.e.,* that material containing some redeeming features or "social value" must be accorded the guaranties of the First Amendment, but that material utterly lacking such value was beyond the purview of the Amendment and could constitutionally be suppressed.

In a recent treatment of the subject of obscenity the United States Supreme Court reaffirmed its adoption of the "social value" test as a standard to be applied.

> ". . . We would reiterate, however, our recognition in *Roth* that obscenity is excluded from the con-

> stitutional protection only because it is 'utterly without redeeming social importance,' and that 'the portrayal of sex, *e.g.*, in art, literature, and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.' *Id.*, at 484, 487. It follows that material dealing with sex in a manner that advocates ideas, *Kingsley Int'l Pictures Corp.* v. *Regents*, 360 U. S. 684, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection. Nor may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance. . . ."
>
> *Jacobellis* v. *Ohio*, 378 U.S. 184, 191.

Consequently, in light of the United States Supreme Court ruling that anti-obscenity statutes may constitutionally be applied to material which is "utterly without redeeming social importance," the book in question must be examined to determine whether the necessary redeeming social importance is present.

John Cleland's Memoirs of a Woman of Pleasure was published in England in the middle of the eighteenth century. Its wide circulation over two hundred years has for obvious reasons been for the most part clandestine. The book is written in the form of two letters from a young lady to an unidentified friend, describing her adventures in and around London. It is not unfair to say that the book is comprised of a series of sexual episodes, most having been participated in by the heroine, some of which she has merely observed. Fanny Hill's progress is traced from her first witnessing of a sexual encounter, through her own

defloration and on into a myriad of experiences and variations. Along the way she is introduced upon occasion to the perverse, which—to her credit—she inevitably finds not to her liking.

The book has been introduced into evidence, and it is unnecessary to examine its contents in much greater detail. The actions and descriptions of the book are virtually entirely sex-oriented. Sexual relations of diverse kinds are described in an uncommonly explicit manner. The reader need do little searching, for the volume is so replete with descriptions of sexual intercourse and other erotica that the book may be opened virtually at random to display its wares. Those paragraphs not devoted to descriptions of the sex act frequently describe preparations for it, thoughts about it or reactions after it. Both the male and the female body are fully explored. There are abundant descriptions of clothing, generally inserted while such clothing is being removed or replaced prior to or subsequent to some erotic adventure. As Fanny herself comments at the outset of her second letter: "I imagined, indeed, that you would have been cloy'd and tired with uniformity of adventures and expressions. . . ."

The publisher insists that this is writing of literary merit and historical significance. The Attorney General would suggest, however, that the United States Supreme Court has not established an impossible standard, nor one which is to be applied in a preposterous manner. When the Court speaks in terms of social or literary value, it does not envisage the intellectual contortions of expert witnesses. The discovery of real value in a piece of writing need not cause such intellectual strain. The "social value" test poses a legitimate question which should be honestly responded to by a realistic appraisal of what the book in question offers.

Cleland was in no way a major or even a comparatively significant figure in eighteenth-century English literature. The fact that he was a contemporary of Richardson and Fielding does not in and of itself confer any particular importance upon him. The products of minor writers are of no greater consequence simply because works of substance are being written at the same time. Cleland's contribution to the development of the English novel was not sufficiently great to warrant his inclusion on college reading lists or his appearance in general collections. *Memoirs* cannot be defended as an example of the writing of a major author, or as a prime example of writing in a particular form or of a specific period. If the book is to be saved, it must be on its own merit alone.

The book has little more than the bare outline of a plot. Character development, despite some suggestions by expert witnesses appearing on behalf of the publisher, is practically non-existent. Individuals appear primarily as good or bad, clever or dull, etc. Fanny herself grows in experience, but changes little if at all in character. Descriptions of skill and consequence are confined entirely to sex portrayals; they are not devoted at all to places, and rarely to people. The Cleland "moral" that love is essential to the complete sexual relationship is neither original nor especially profound; in addition, it could have been presented just as forcefully with a fraction of the erotica which is the book's chief feature. The conclusion is unavoidable that the incredibly explicit sexual portrayals are included, not to illustrate a theme, but for their own sake and interest.

This is not a book that has anything particularly of consequence to say. It could hardly be compared to a masterpiece such as *Ulysses,* a product of a great literary figure who had much to comment upon beside the subject of sex. Critics have suggested that Fanny Hill would be

shocked by the language used by Lady Chatterly and her husband's gamekeeper. But the Lawrence volume is a work of social comment and recognized merit, and the author's reactions to the effects of industrialization in England certainly redeem the book, if indeed, redemption is necessary. Even *Tropic of Cancer*, distasteful as parts of it may be, contains excellent descriptions of Paris and many pages of Miller's interesting philosophy.

Memoirs can claim none of this. It can rely only on the fact that its various descriptions are offered with a degree of good humor and with an absence of coarse language. But the Attorney General contends that a good writing style is not sufficient under the standards developed in *Roth*. The "social value" test is one of substance, not merely of style. The Court has not envisioned that subject matter clearly obscene under each legal test is to be protected simply by virtue of the fact that its author has applied a highly developed vocabulary to his questionable product.

The trial justice, in his findings, rulings and order, characterized the book as follows:

> ". . . The book intimately describes in a continuous sequence one sexual adventure after another of the types above described mortised together with short transitory passages which simply set the stages for the recital of the ensuing sex adventures. Its evident purpose is to sexually arouse its readers and keep them aroused. . . ." (R. 113.)

The Attorney General admits that repetitious descriptions of sexual episodes do not necessarily make a work obscene. But such repetition is an indication of the book's purpose, and suggests what its relative merit may be.

Expert witnesses called by the publisher testified that the work "creates an effect that is primarily literary,"

"contains a 'plot with a purpose,'" and "is a 'novel of education.'" The heroine is described as an intellectual, and the book as a whole as a novel that "succeeds" (R. 42-43, 55, 59, 85).

The Court must of course make such decisions for itself. But the Attorney General suggests that the above comments add little to the analysis. Reflection by the narrator amounts to little if the subject matter upon which she reflects is essentially pornographic. The book may indeed have a purpose; but, since material other than sexual description is totally lacking, the Attorney General is forced to agree with the trial justice that such purpose clearly is to arouse the reader sexually and to keep him aroused.

The Attorney General agrees that the expression of ideas, no matter how hateful such ideas may be to the prevailing climate of opinion, has the full protection of the guaranties of the First Amendment. But an idea must exist before it can be protected. Ideas as such are totally absent in the book before the Court. The book is the literary equivalent of the pornographic picture, a product containing no intrinsic merit other than its power to arouse. It is that type of completely unredeemed material which—under *Roth* —is to be denied First Amendment protection.

II. The Average Person, Applying Contemporary Community Standards, will Find that the Dominant Theme of the Material Taken as a Whole Appeals to Prurient Interest; Accordingly, the Book in Question is Not Entitled to the Protection of the Guaranties of the First Amendment under the So-Called "Prurient Interest" Test.

The majority opinion in *Roth* v. *United States*, 354 U.S. 476, laid to rest the old obscenity test formulated in 1868

in England in the case of *Regina* v. *Hicklin*, L.R. 3 Q.B. 360. *Roth* developed another of the tests which determine obscenity, *i.e., whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest* (p. 489).

On the basis of each of the elements contained in the above-quoted rule, the Attorney General submits that the book in question is obscene under this test. The standard is that of the average person. Admittedly, this does not refer to the peculiarly susceptible individual into whose hands the book might happen to fall—the child, the pervert, etc. But neither does it refer to the highly motivated, literary person represented by the publisher's expert witnesses. It is not unfair to suggest that the average person will not—despite the publisher's contention—carefully peruse the Introduction by Peter Quennell and the historical Note included in the Putnam edition. Nor, it is safe to say, will he view the book primarily as an example of eighteenth-century English literature, or be especially engrossed by whatever moral its author may or may not have intended to develop.

The publisher implies that the reader who skips the Introduction in a hasty search for titillating passages must be disregarded. Such a statement flagrantly ignores the realistic facts of life about the reading public and the publishing business. A glance at any newsstand reveals that the publishing industry is clearly aware of the sale potential of sex-filled volumes. Such books are not published for the reader who examines introductions. The Attorney General submits that they are produced *for the average person,* one who purchases the book with a knowledge of what it is and the intention to indulge in what is clearly the book's prime attraction. Success in business is frequently a result of developing a product which does appeal to the

average person, so that the market for such product will be as broad as possible. This material is produced for the purpose of reaching as wide an audience as possible; otherwise such publication would be unwise from a business viewpoint. *Memoirs* was published for the average person and its passages appeal to and stimulate the ordinary reader. *Memoirs* appeals to the same person who purchases the less skillfully portrayed erotic volumes which occupy a larger and larger percentage of the literary market.

It is understood that the "average person" of the *Roth* case will naturally apply "contemporary community standards" to what he reads. The average reader is of course neither the especially susceptible person nor the literary expert who can view a highly erotic piece of writing as merely a segment of eighteenth-century English fiction. Likewise, "contemporary community standards" are not those of Victorian times, or even those in force prior to the Depression in the United States. But neither are they quite so liberal as the publisher would argue.

Contemporary attitudes toward sex and its discussion and portrayal are not such that the material contained in *Memoirs* can pass as normal fare acceptable to the mass of this nation's people. People may perhaps be more informed than ever before on matters of sex, and as a topic for discussion sex probably appears with greater frequency. The reader is often subjected to four-letter words and almost clinical sexual descriptions. But it simply is not true to state that there exists general public acceptance of what Cleland offers: approximately two hundred pages of continual and highly erotic sexual experiences, described in a manner which leaves virtually nothing to even the dullest imagination. No newspaper or magazine of general circulation contains such; and, should the subject matter be discussed in public, the average person would certainly be surprised and probably discomforted.

The publisher attempts to justify the book by establishing that contemporary community standards are such that the exploits of the heroine and the descriptions thereof are ordinary fare. Reference is made to the suggestive moving-picture advertisement, the beautiful woman in a television commercial, etc. But the distinction between use of an attractive young lady for the purpose of selling beer or automobiles and the material presented on page after page in *Memoirs* is not even a subtle one. The public is familiar with and accepts the appearance of women in television commercials; it does not accept what appears in *Memoirs*.

In the trial Court and before the Supreme Judicial Court the publisher referred to the extensive coverage given by the press to recent activities of certain members of the British Cabinet. But no newspaper reporter followed Miss Keeler and her acquaintances into the boudoir. Even the tabloid reports of the British scandals do not compare in any way to the descriptions in *Memoirs*. The Attorney General is not convinced that public interest in the British scandals indicates acceptance by the average person of the material offered by John Cleland.

In the light of consideration of the average person and of the community standards involved, the United States Supreme Court has directed that the material in question be examined to determine whether its dominant theme "appeals to prurient interest." Under the *Roth* decision the book as a whole must be examined, rather than simply isolated passages.

Examining *Memoirs* as a whole is not difficult. The scenes and subject matter of any given twenty-page section of the volume are for all practical purposes the same as those of any other twenty-page section. There is little if any problem of separating questionable passages from passages of merit. Books such as *Ulysses, Lady Chatter-*

ley's Lover and *Tropic of Cancer,* each of which has survived bitter censorship battles, contained many passages of real merit, and whole sections having nothing at all to do with sex. Such is not the case with *Memoirs;* the book can only be considered as a whole, since the material is virtually the same from cover to cover.

The dominant theme of the book is the portrayal in prose of sex and sexual relationships. That this was the author's purpose is inescapable, considering the amount of material and the percentage of the book devoted to the subject. The publisher may argue that the author's theme is something else; but no other theme or moral would require the incessant portrayals that feature the book in question. The amount of erotica that the work contains permits no conclusion but that sex portrayal is included for its own sake and was the primary reason for writing the book at all.

This Court has established as a standard whether the dominant theme "appeals to prurient interest." The Court noted that this test was very close to that proposed by the American Law Institute.

> "We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A. L. I., Model Penal Code, § 207.10 (2) (Tent. Draft No. 6, 1957), *viz.:*
>
> "'. . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . .'"
>
> *Roth* v. *United States, supra,* at page 487.

As discussed above, the book clearly goes far beyond what the public has become accustomed to in sexual descrip-

tion. The Attorney General submits that the chief—and in most cases the only—reason that this book is purchased is because of what the material offers in the way of exciting erotic passages and unusual representations of sexual relationships. The average person selects this book because he can find therein material which is unusual, and rarely produced for consumption by the general reading public. It cannot be too strongly emphasized that the United States Supreme Court has not created an impossible standard. Had it been the Court's purpose to extend the First Amendment to cover all writing no matter what the quality or subject matter, the Court would have said so. The Court has established tests which must be viewed from a practical point of view. The fact of the matter is that the average person picks up this book in order to peruse the sexual descriptions. Such may not be the object of the English professor; but his is not the standard identified by the Court. The dominant theme of this book is sex and its portrayal, and as such it clearly appeals to the interest or desire of the ordinary person to examine the unusual and ordinarily forbidden material that it offers.

III. The Book in Question is Not Entitled to the Protection of the First Amendment Guaranties, because it is "Patently Offensive" in the Sense in which That Expression is Used in the Case of Manual Enterprises, Inc., v. Day.

In *Manual Enterprises, Inc.*, v. *Day*, 370 U.S. 478, the United States Supreme Court made it clear that the "prurient interest" test was not the sole means by which obscenity should be determined. Referring to certain magazines that had been presented for consideration, the Court formulated the "patent offensiveness" or "indecency" test.

> ". . . These magazines cannot be deemed so offensive on their face as to affront current community standards of decency—a quality that we shall hereafter refer to as 'patent offensiveness' or 'indecency.' Lacking that quality, the magazines cannot be deemed legally 'obscene,' and we need not consider the question of the proper 'audience' by which their 'prurient interest' appeal should be judged."
>
> *Manual Enterprises, Inc.*, v. *Day, supra,* at page 482.

This test frequently, of course, requires considerations similar to those necessary under the "prurient interest" test, since material whose dominant theme appeals to prurient interest will more often than not offend the ordinary reader. However, the Court has stated it as a separate test, and the book must be examined from the separate viewpoint of whether its material is or is not offensive to the average reader.

The publisher points out that the book is inoffensive in expression. But offensiveness is not limited to use of four-letter words, or even to the degrading portrayals that feature a work such as *Tropic of Cancer*. Something is patently offensive when it violates an individual's concept of appropriate behavior. An occasional description of a sexual encounter included for a purpose that relates to other subject matter will probably not offend any but the most sensitive. But a work devoted completely to the most explicit sexual descriptions, no matter how well written, does—it is submitted—offend the average person.

The "patent offensiveness" test appears to be designed as a "safety valve" to protect against overly vigorous application of the prurient interest standard. It is conceivable that material which appeals primarily to prurient in-

terest in the sense discussed above might nevertheless—for some reason—not be offensive to the average member of the community. If such a piece of writing exists, the patent offensiveness or indecency test would undoubtedly protect it.

This is a test which relates to the sense of propriety and good taste of the average person. The desirability of freedom to dissent and to adopt unpopular positions is protected by the "social importance" test, and does not relate to the indecency test of *Manual Enterprises.* The latter test is directed, not to the protection of the right to disagree, but to the identification of the thoughts and reactions of the average members of the national community. It is not meant to be a shield to protect highly erotic writing which clearly meets the other legal tests of obscenity, simply because the offensive material may perhaps be well written. Skillful writing will not save what is patently offensive upon its face. The Attorney General submits that the overwhelming amount of erotic material to be found in *Memoirs,* obviously offered entirely for its own sake, and with descriptions going far beyond what normally may be expected, makes the book patently offensive to the average person in the sense of the *Manual Enterprises* decision.

IV. The Standards Set Forth by the United States Supreme Court in Roth and Manual Enterprises have Not been Altered; Fair Application of Such Standards Requires that "Memoirs" be Adjudged to be Obscene and Not Entitled to the Protection of the Guaranties of the First Amendment.

Roth and *Manual Enterprises* still set forth the standards by which expression is to be judged. The United States Supreme Court has yet to adopt the minority posi-

tion that the First Amendment is absolute and that accordingly anti-obscenity legislation can never be constitutional. A majority of the Court still agrees that certain types of material will not be constitutionally protected, and that such material may lawfully be suppressed by the states. The standards of *Roth* and *Manual Enterprises* are still the law of the land, irrespective of reluctance by some state and federal courts to apply them. Nothing after *Roth* in any way implies that this case is no longer the primary guide in this area.

Shortly after the rendering of the *Roth* decision the United States Supreme Court—in four *per curiam* decisions [1]—reversed rulings of federal Courts of Appeals which had treated varying types of material as obscene. The cases involved a film relating to the seduction of a young man by an older woman; nudist publications; and a magazine published for homosexuals. The present publisher has implied—while the present matter was before the Supreme Judicial Court of Massachusetts—that reversal of the decisions that these materials were obscene indicates *a fortiori* that *Memoirs* must be protected.

The petitioner admits that the decisions of the lower federal courts were reversed in these cases. In fact, in the *Mounce* case, error was confessed by the Solicitor General prior to argument. It does not appear that the Court acted in any way upon the question whether the materials were or were not obscene. The lower federal courts whose decisions were reviewed had applied obscenity standards other than those set forth in the *Roth* case. (The *Roth* case had just been decided.) These *per curiam* reversals appear to

[1] *Times Film Corp.* v. *Chicago*, 355 U.S. 35 (revg. 244 F. 2d 432, 436 [7th Cir.]). *Mounce* v. *United States*, 355 U.S. 180 (revg. 247 F. 2d 148 [9th Cir.]). *One, Inc.*, v. *Olesen*, 355 U.S. 371 (revg. 241 F. 2d 772 [9th Cir.]). *Sunshine Book Co.* v. *Summerfield*, 355 U.S. 372 (revg. 249 F. 2d 114 (Ct. App. D.C.)).

have been a means by which this Court instructed the lower federal courts as to the changes brought about by the *Roth* decision. They cast no light upon the particular materials that happened to be before the Court.

Quite recent statements by the United State Supreme Court on the subject of obscenity appeared in three decisions rendered on June 22, 1964. These decisions have simply reaffirmed the standards set forth in *Roth*. *A Quantity of Copies of Books* v. *Kansas*, 378 U.S. 205, involved the constitutionality of a particular state procedure. It had been the custom of the State of Kansas to seize allegedly obscene material prior to the holding of an adversary hearing on the subject of obscenity. The Court ruled that such seizure was an unlawful restraint, and declared the statute authorizing it to be unconstitutional. At no time in this case did the majority express itself on the question of obscenity of the materials involved. The *Kansas* case in no way affects the present obscenity standards, and is of little help in resolving the present dispute.

In *Jacobellis* v. *Ohio, supra,* the United States Supreme Court reversed a state court conviction of an Ohio theater manager for exhibiting the film "The Lovers." The statute pursuant to which parts of the film had been held to be obscene was held by the Court to violate the constitutional guaranties of freedom of expression. The Court took the opportunity to define further the phrase "contemporary community standards," explaining that the community standards referred to must be national rather than local. The case is of special interest to the present litigation because of its clear reiteration of the standards set forth seven years earlier in *Roth* v. *United States*. The Court stated, at page 191: "Recognizing that the test for obscenity enunciated there . . . is not perfect, we think any substitute would raise equally difficult problems, and we therefore adhere to that standard." And at page 196

the Court concluded: "We have viewed the film, in the light of the record made in the trial court, and we conclude that it is not obscene within the standards enunciated in *Roth* v. *United States* and *Alberts* v. *California, which we reaffirm here.*" (Emphasis supplied.)

In *Grove Press, Inc.*, v. *Gerstein*, 378 U.S. 577, the Court reversed an adjudication by the Supreme Court of Florida that Henry Miller's *Tropic of Cancer* was obscene. The Supreme Judicial Court of Massachusetts has already recognized that *Tropic of Cancer* is entitled to First Amendment protection (*Attorney General* v. *The Book Named "Tropic of Cancer,"* 345 Mass. 11), and the *Gerstein* case supports that decision.

Following *Roth*, the Supreme Judicial Court ruled that the question of obscenity was one requiring the exercise of constitutional judgment, and that only material that was without redeeming social significance could properly be considered obscene. Under the "prurient interest" test, material must be judged by its effect upon the average person, and it must of course be considered as a whole. The portrayal of sex in and of itself is not sufficient to deny a work First Amendment protection; but hard-core commercial pornography without redeeming importance would not be protected.

In a four to three decision the Court decided that in *Tropic* Henry Miller had made a conscious effort to create a literary work of art, and that he had achieved a product of some significance. It must be conceded that Miller is a major twentieth-century writer. The book—in its own way—is brilliantly written, with some outstanding descriptive passages. The reader may well disagree with much of it; but Miller's philosophy and view of society between the wars is powerful and extremely relevant. Clearly, what *Tropic* offers of value prevents its being adjudged obscene.

The Attorney General is aware of the decision of the New York Court of Appeals in *Larkin* v. *G. P. Putnam's Sons,* 14 N.Y. 2d 399, 200 N.E. 2d 760, wherein a majority of that Court ruled that *Memoirs* was entitled to First Amendment protection. The Attorney General submits that the New York Court is in error, and agrees with dissenting Justices Desmond and Scileppi that the majority simply did not apply existing law realistically. The thought processes of the majority are difficult to reconstruct from the majority opinion, which lacks any real attempt to analyze the book or to apply appropriate standards. Individuals may disagree with the standards of *Roth;* but these standards should not be altered by fiat of state courts.

Memoirs is not *Tropic of Cancer.* Admittedly lacking the shock treatment technique of *Tropic,* it is yet more sex-oriented, more offensive through its constant, unrelieved repetition. The saving philosophical and descriptive values of *Tropic* are totally lacking in *Memoirs.* The publisher has—in defense of the book—struggled to apply the standards of *Roth* and *Manual Enterprises.* The publisher has sought to expand First Amendment guaranties, which, in the past, have protected works such as *Ulysses, Lady Chatterly's Lover* and *Tropic of Cancer,* to a point far beyond what the United States Supreme Court has indicated is the limitation upon those guaranties. It cannot seriously be maintained that *Memoirs* ranks with the above-mentioned volumes. A collection of sexual episodes and nothing else, it totally lacks the redeeming value which would warrant First Amendment protection.

The Attorney General grants that the "freedom of speech" clause of the First Amendment is and should be liberally construed. Nevertheless, this Court has clearly established that obscenity is not entitled to the protection of the First Amendment guaranties. Accordingly, the

Court has developed the three tests discussed above as guides to a determination as to whether given materials are to be held to be obscene. At no time has the Court indicated, despite the publisher's insistence that books must be given special treatment, that these tests were not to be applicable to all types of expression—books as well as films, periodicals as well as recordings. Had this Court desired to insulate books completely from the operation of obscenity legislation, it presumably would have said so with clarity.

Were the three tests of obscenity to be discussed but never realistically applied, development of these tests by the United States Supreme Court would have been a vain endeavor. The Attorney General submits that this Court would not have concerned itself with the development of standards unless the Court intended that—at least on occasion—the standards would operate so that a given piece of writing would be declared obscene on the basis of them. *Memoirs* subjects the reluctance to apply these standards to its ultimate strain; should this Court rule that application of the three tests does not require an adjudication of obscenity, it is extremely doubtful that the tests may ever successfully be applied to writing which is in novel form.

Conclusion.

It is not the business of the Attorney General to be either a critic or a censor; but his duties do include clarification and enforcement of the law. The questions raised by the necessity of balancing First Amendment guaranties with the rights of the states under their police power to regulate the publication and distribution of obscene materials are extremely sensitive ones, and easy solutions are not available. The decision by the Supreme Judicial Court to

the effect that *Memoirs* is obscene is the first time since the rendering of the *Roth* decision that that Court has concluded that a given piece of writing could constitutionally be suppressed. Because of the nature of the writing in question, it is hoped that treatment by the United States Supreme Court not only will further clarify the rights of the states and the effect of the First Amendment upon such rights, but will also be of value in the making of decisions with respect to enforcement of obscenity legislation.

If obscenity legislation is to have an effect upon books at all, it must have an effect upon this one. Should the United States Supreme Court determine—for one reason or another—that the public cannot constitutionally be deprived of *Memoirs,* then, it is submitted, the tests of *Roth* and *Manual Enterprises* must—at least in this one case—be altered or suspended. If, however, the tests are to be reasonably applied, this book must be declared to be obscene, and consequently not protected by the First Amendment. Accordingly, it is respectfully requested that this Court affirm the decision of the Supreme Judicial Court of Massachusetts and the final decree entered thereon.

EDWARD W. BROOKE,
Attorney General,
By WILLIAM I. COWIN,
Assistant Attorney General,
JOHN E. SULLIVAN,
Assistant Attorney General,
State House,
Boston, Massachusetts.